

Ace Beverage Co. and William W. Hoffer, Ray Furstenuau, Epifanio Gonzalez, and Ron Drake.
Cases 21 CA 15142, 21-CA-15150, 21-CA-15162, and 21-CA-15163

July 17, 1980

SUPPLEMENTAL DECISION AND
ORDER

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND PENELLO

On July 20, 1979, Charging Party Ron Drake¹ filed a Motion to the Board for Clarification of and/or Determination of Compliance with the Board's Decision and Order in *Ace Beverage Co.*² In his motion the Charging Party alleged, *inter alia*, that the backpay formula adopted by the General Counsel in the instant proceeding, which takes into account a strike settlement agreement between Respondent and the Union, is inconsistent with the reinstatement and backpay remedies ordered by the Board, and that the Board should therefore clarify its remedial order or determine whether there has been compliance therewith. On January 15, 1980, the Board issued a Notice To Show Cause why the Charging Party's motion should not be granted and why the Board should not interpret its Order in this proceeding in the manner urged by the Charging Party and order further proceedings consistent with that determination. Thereafter, the General Counsel filed a response to the Charging Party's motion and Respondent and the Charging Party filed responses to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record herein including the briefs and exhibits of the parties filed in connection with the Charging Party's Motion and makes the following findings and conclusions.

The Facts

Based in part on charges filed by the Charging Party on October 26, 1976, the consolidated complaint in the instant proceeding issued on December 21, 1976. Thereafter the Board, on December 16, 1977, issued a Decision and Order, *supra*, adopting Administrative Law Judge Bernard J. Seff's finding that, *inter alia*, Respondent violated Section 8(a)(3) and (1) of the Act by demoting on September 14, 1976, employees Ron Drake and

Epifanio Gonzalez from the position of route supervisor to that of route salesman because they refused to agree to work in the event of a strike. In his Decision the Administrative Law Judge found that, commencing October 6, 1976, Respondent's employees, including Drake and Gonzalez, engaged in a lawful strike which ended on December 6, 1976, when the Union and various beer distributors, including Respondent, agreed upon a strike settlement and a new contract. The Administrative Law Judge noted, but made no ruling on, the strike settlement agreement containing a provision that, *inter alia*, if a decertification petition was pending involving a unit of salesmen, an employer would be required to reinstate the striking salesmen only if the Union won the decertification election. Such a decertification petition was filed by Respondent's employees, but the ballots of the ensuing election conducted on January 6, 1977, were impounded pending the outcome of certain other unfair labor practice charges against Respondent and other beer distributors. The Board in its Decision and Order made no comment on the settlement and adopted the Administrative Law Judge's recommendation that Respondent be ordered to offer Drake and Gonzalez immediate and full reinstatement to their former jobs or, if such positions no longer existed, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for such loss of pay as they may have suffered as a result of Respondent's discrimination against them.³

On December 18, 1978, the Region 21 compliance officer wrote a letter to Respondent stating in pertinent part:

Under the terms of the parties' strike settlement, however, the Union waived the rights of Drake and Gonzalez to be reinstated as route salesmen, the position they held at the time of the strike, because it agreed that they would not be returned to that position if the Union was unsuccessful in winning the election under the pending decertification petition. In view of these circumstances, a determination has been made that the backpay shall be calculated on the basis of the difference between what Gonzalez and Drake would have earned as route supervisors and what they would have earned as route salesmen had they returned to the Employer after the strike.

On March 1, 1979, the Charging Party's counsel wrote a letter to the compliance officer contending that the above-described backpay formula was

¹ Hereinafter references to Charging Party are to Charging Party Ron Drake.

² 233 NLRB 1269 (1977).

³ Following issuance of the Board's Decision herein it was determined that the Union had lost the decertification election.

based on a theory regarding the strike settlement which was raised for the first time at the compliance stage and was inconsistent with the reinstatement and backpay remedies ordered by the Board. The letter requested the issuance of a backpay specification and notice of hearing thereon to afford the Charging Party an opportunity to litigate these contentions. By letter dated March 14, 1979, the compliance officer denied this request, stating that the effect of the strike settlement was considered to be a novel compliance issue and had, therefore, been submitted by Region 21 to the General Counsel, Division of Operations Management, for advice, where it was determined that backpay should be computed in the manner contested by the Charging Party. The Charging Party then filed an appeal to the General Counsel, arguing that when the Board decided its original Decisions and Order, *supra*, it was fully aware of the strike settlement, yet did not discuss or adopt any proposition that the agreement affected Drake's entitlement to reinstatement or to any part of the backpay which might be due him. Instead, the Charging Party argued, the Board clearly directed Respondent to reinstate Drake to the position of route supervisor from which he was unlawfully demoted on September 15, 1976, and to pay him the wages he would have earned as a route supervisor from that date until he was offered reinstatement (less interim earnings and wages he would not have earned during the strike). Thus the appeal stated:

2. . . we cannot agree, however, that the Compliance Officer or the General Counsel has any authority to "compute" a discriminatee's backpay by means of a formula which derogates from the unambiguous direction of a Board remedial order, and effectively reduces the backpay ordered by the Board by at least 80% in the absence of a formal motion for modification and/or clarification of the Board's backpay Order, and/or a formal backpay specification, which the Charging Party would be permitted to litigate before the Board.

By letter dated June 5, 1979, the General Counsel denied the Charging Party's appeal, asserting that the determination of whether such a controversy exists or whether a charging party's or a discriminatee's objections to a backpay computation warrant further formal proceedings before the Board is within the General Counsel's administrative discretion, no less than would be his determination whether to issue an unfair labor practice complaint.

The General Counsel further stated that the backpay formula at issue herein is based on the theory that the waiver of reinstatement to route salesman position embodied in the strike settlement

agreement is an intervening event that mitigates total backpay liability. The General Counsel concluded that the backpay formula fully remedied the financial loss resulting from the unlawful demotion of Drake and effectuates the policies of the Act.

On June 12, 1979, the compliance officer sent a letter addressed to Respondent, with copies to all parties, computing the Charging Party's backpay and interest pursuant to the contested backpay formula for the period ending with his March 1979 reinstatement as route supervisor.⁴ On June 21, 1979, the case was closed, the Region having determined that Respondent complied with the Board's Order.

Contentions of the Parties

In his motion and response to the Notice To Show Cause the Charging Party reiterates the contentions set forth in his appeal to the General Counsel; namely, that pursuant to the Board's Decision and Order he is entitled to reinstatement to his former position as route supervisor and to backpay equal to the amount he would have earned as route supervisor from September 15, 1976, when he was unlawfully demoted to route salesman, until March 21, 1979, when he was reinstated pursuant to a valid offer. In this regard, the Charging Party contends that the strike settlement agreement does not constitute a valid waiver of his backpay rights. He further contends that the General Counsel and Respondent are now precluded from so asserting because at no time prior to the compliance stage of this proceeding had either of them suggested that the settlement agreement, which was in evidence before the Administrative Law Judge, "extinguished, or diminished" Respondent's backpay liability.

In their responses to the motion and/or the Notice To Show Cause the General Counsel and Respondent contend that the instant motion should be denied because the General Counsel's formula, which computes the Charging Party's backpay as the wage differential between his original position as route supervisor and the position of route salesman which he held at the time of the strike, is appropriate. They reason that the Union, by the terms of the strike settlement agreement, waived the Charging Party's right of recall to the route salesman position which he held at the time of the strike; that his waiver did not extend to, and therefore does not compromise, the Charging Party's right to reinstatement to the position of route supervisor from which he was unlawfully demoted

⁴ The compliance officer in this letter states that Drake was reinstated March 21, 1979. In its response to the Notice To Show Cause, Respondent sets March 5, 1979, as the date it tendered a valid offer of reinstatement to the Charging Party.

and which he sought to preserve by filing an unfair labor practice charge before the conclusion of the strike settlement; and that, in these circumstances, the waiver of recall to the route salesman position should be viewed as an intervening event that mitigates, if it does not extinguish, Respondent's backpay liability.

Respondent further contends that the method of computing backpay herein is not properly before the Board because determination of whether issuance of a backpay specification and further proceedings before the Board is necessary is a matter solely within the General Counsel's administrative discretion. The General Counsel, on the other hand, has indicated that if the Board concludes that the proposed backpay formula is inappropriate and does not fully remedy the unlawful demotion of the Charging Party, he would join in the request to clarify the Board's Order and will compute backpay accordingly.

Discussion

At the outset we find no merit to Respondent's contention that the General Counsel's authority and discretion in compliance matters⁵ is analogous to that granted him under Section 3(d) of the Act with respect to issuance of unfair labor practice complaints,⁶ and that, therefore, his action in compliance matters is also final.⁷ Unlike the delegation of "final authority" to issue complaints under Section 3(d), however, the delegation of compliance matters to the General Counsel is designed to carry

out the Board's intent that its orders be properly implemented. Thus, in compliance matters the General Counsel does not act on his own initiative as he does in the issuance of complaints but as the Board's agent in effectuating the remedy ordered.⁸

In this regard, Section 101.13(b) of the Board's Statements of Procedure specifically provides that despite compliance, the Board's order is a continuing one and that the closing of a case is thus conditioned upon continued compliance with the Board's order. This equally as true when a proposed backpay formula fails to comport with the Board's order as it is when a Respondent has breached the provisions of compliance.

Accordingly, we find that there is no jurisdictional bar to the review of the General Counsel's action in the compliance stage of this proceeding, and that the issues raised by the instant motion are properly before us.

As to the backpay formula proposed by the General Counsel and Respondent, we find that it fails to comport with the Board's remedial order in *Ace Beverage Co.*, *supra*. It is uncontested that pursuant to the Board's Order the Charging Party is entitled to reinstatement to his predemotion position of route supervisor and to backpay commencing on the date he was unlawfully demoted. It is also clear that he was not validly offered reinstatement or reinstated to that position until March 1979. As for the strike settlement agreement waiving the Charging Party's poststrike right to recall to his *demoted route salesman position*, we find that it is irrelevant to his backpay rights and, hence, neither mitigated nor extinguished Respondent's obligation under the Board's Order to make the Charging Party whole for any loss of pay he may have suffered as a result of its unlawful conduct. The strike settlement agreement was a private one which bore no relationship to Respondent's unfair labor practices regarding the Charging Party. The latter was not a party or privy to the agreement, and its terms were wholly unconcerned with the Respondent's preshrike unlawful demotion of the Charging Party from route supervisor to route salesman. Furthermore, the agreement did not address itself to route supervisors at all, and thus by its very terms had no application to those like the Charging Party who are entitled to be restored to the position of route supervisors with all attendant rights and privileges in order to remedy the unfair labor practice committed against them.

The General Counsel and the Respondent argue, nevertheless, that the Charging Party's participation in the strike as a route salesman was an inter-

⁵ Sec. 102.52, *et seq.*, of the Board's Rules and Regulations, Series 8, as amended, provide for backpay proceedings and state, in pertinent part:

After the entry of a Board order directing the payment of backpay or the entry of a court decree enforcing such a Board order, if it appears to the regional director that a controversy exists between the Board and a respondent concerning the amount of backpay due which cannot be resolved without a formal proceeding, the regional director may issue and serve on all parties a backpay specification in the name of the Board.

Sec. 101.13(b) of the Board's Statement of Procedure states, in pertinent part:

If the respondent effects full compliance with the terms of the order, the regional director submits a report to that effect to Washington, D.C., after which the case may be closed. Despite compliance, however, the Board's order is a continuing one; therefore, the closing of a case on compliance is necessarily conditioned upon the continued observance of that order

⁶ Sec. 3(d) of the Act states, in pertinent part, that the General Counsel:

. . . shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

⁷ General Counsel also took this position in denying the Charging Party's appeal from the backpay computation made herein pursuant to the backpay formula now at issue. It is not clear whether the General Counsel still holds to this view. We note, however, that the General Counsel does not argue this position before us and in fact urges us to clarify the Board Order in this case if we find that the disputed formula does not fully remedy the unlawful demotion of the Charging Party.

⁸ See *Jacobs Transfer, Inc.*, 227 NLRB 1231, 1234 (1977).

vening event which served to make the strike settlement agreement applicable to him—at least in that capacity. This argument, however, ignores that it was the Charging Party's unlawful demotion which cast him in the role of a route salesman. That being so, the Charging Party's position as a route salesman cannot be divorced from the Respondent's culpability. Thus, while it is true that at the time of the strike the Charging Party was a route salesman and not a route supervisor, it is also true that his situation was not of his own doing. Rather, Respondent's unlawful conduct had brought it about. Absent Respondent's unlawful demotion of him, the Charging Party would not have been a route salesman during the strike and his job would not even arguably have been subject to the terms of the strike settlement agreement.

It would be anomalous indeed for this Board to hold that the Charging Party's backpay rights as a route supervisor can be compromised by a private strike settlement agreement which waives the right of recall to the position of route salesman, when the Board decided that the Charging Party had been unlawfully demoted to that position before the strike and ordered his reinstatement to the route supervisor position he held before the unlawful demotion. Since Respondent's wrongdoing caused the Charging Party to be placed in the circumstances which, it is argued, make him vulnerable to the agreement, Respondent, and not the Charging Party, must bear the burden of its illegal conduct. That burden includes the cost of making the Charging Party whole without reliance on the agreement and its application. Any other conclusion would permit the Respondent, as the wrongdoer, to benefit from its wrongful action.

The argument of the General Counsel and Respondent also fails to fully consider that the Charging Party's status as a discriminatee under the Act bestowed upon him rights which set his situation apart from that of other striking employees.⁹ Although they have acknowledged a difference exists to the degree that the strike settlement agreement did not completely extinguish the Charging Party's right to reinstatement and backpay in the capacity of a route supervisor, their position evidences a failure to recognize the full nature of the remedial rights which his discriminatee status extends to him under the terms of the Board Order. Thus, they have failed to realize that in determining his reinstatement and backpay rights for the period he participated in the strike, the Order in effect requires

⁹ One other employee, Epifano Gonzalez, who was also unlawfully demoted to a route salesman position, maybe similarly situated. However, Gonzalez' status with respect to this compliance matter can not be determined on the state of the record now before us.

that he be treated as if he did so as a route supervisor, the position which he would have held but for the discrimination practiced against him, and not as a route salesman. Only in that way can the Board's Order, as it applies to the Charging Party, be properly and fully carried out.¹⁰

In view of the foregoing, we find that, because the strike settlement agreement is unrelated to the violation found and immaterial to the rights of the Charging Party to reinstatement and backpay as a striker and thereafter, it is wholly irrelevant to the effectuation of the Board's Order concerning him. Consequently, we further find that the proposed backpay formula, to the extent it is premised on said agreement, is defective and must, therefore, be rejected.¹¹

Accordingly, we find that the Charging Party is entitled to reimbursement for the loss of pay he would have earned as a route supervisor from September 15, 1976, the date he was unlawfully demoted, until he was reinstated to his former or a substantially equivalent position or validly offered such reinstatement,¹² less interim earnings and the wages he would not have earned during the strike. Having so found, we order the record herein be reopened, and the case be remanded to the Regional Director for the issuance of a backpay specification to determine the exact amount of backpay due in accordance with this Decision.¹³

ORDER

It is hereby ordered that the Charging Party's motion be, and it hereby is, granted.

¹⁰ So as to avoid any further misconstruction of that Order and how it is to be effectuated, the Charging Party's status as a route salesman shall not be considered or given any effect in assessing his right to reinstatement or in computing his backpay while he participated in the strike, or thereafter. Of course, insofar as his participation in the strike—regardless of his status—constituted a withholding of his services from the Respondent, that shall be taken into account in the backpay computation. Further, our conclusions here do not mean that, for the period between his demotion and striking, his earnings as a route salesman should not be entertained as an offset against gross backpay owing him as a route supervisor during such period. Rather, our holding means that his route salesman status is not relevant for any other purpose and does not, therefore, otherwise survive to affect his remedial rights.

¹¹ In light of the foregoing, we do not need to consider the Charging Party's contention that, because the General Counsel and Respondent did not raise the effect of the settlement agreement on the Charging Party's backpay prior to the compliance stage of this proceeding, they are now foreclosed from asserting that it extinguished or diminished Respondent's backpay liability.

¹² We note that Respondent claims that it offered reinstatement to the Charging Party on March 5, 1979, and that the General Counsel considers his backpay period to end with his reinstatement on March 21, 1979. This conflict can be resolved in the further stage of this proceeding as ordered below.

¹³ It is not entirely clear whether Epifano Gonzalez is in exactly the same position as the Charging Party with respect to backpay. However, we shall reopen the record with respect to Gonzalez as well and direct that the Regional Director issue any backpay specification necessary to make Gonzalez whole consistent with our findings set forth above with respect to the backpay due the Charging Party.

IT IS FURTHER ORDERED that the record in this proceeding be, and it hereby is, reopened, and the case be remanded to the Regional Director for Region 21 for the issuance of a backpay specification and notice of hearing thereon, as provided in

Section 102.52 of the Board's Rules and Regulations, Series 8, as amended, and that, thereafter, the procedure shall be governed by the provisions of Section 102.54 of the Board's Rules and Regulations.